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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 677

ALVEY L. SMITH and PHYLLIS V. SMITH,
Petitioners,

vs.

GEORGE R. MYERS and CATHERINE L. MYERS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio ~~and the Court of Appeals of Summit County, Ohio.~~

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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio and the Court of Appeals of Summit County, Ohio.

The petitioners pray that a writ of certiorari issue to review the final judgment of the Ohio Supreme Court rendered on November 2, 1960, Because the Ohio Supreme Court declined to entertain the Petitioners' appeal, this petition is directed to both the Ohio Supreme Court and the Ohio Court of Appeals for the Ninth Judicial District.

OPINION BELOW.

The opinions of the Ohio Court of Appeals for the Ninth Judicial District and the Common Pleas Court of Summit County, Ohio, are set forth in Appendix A and B, *infra*, pages 9-12 and 13-14.

JURISDICTION.

On October 5, 1960, the Supreme Court of the State of Ohio overruled a Motion for an order directing the Court of Appeals of Summit County to certify its record and dismissed an appeal from the same Court for the reason, "No debatable constitutional question is involved in said cause." And on November 2, 1960,[1] the Ohio Supreme Court denied a rehearing of aforementioned motion and appeal.

The Ohio Supreme Court rejected the Petitioners contention based upon the Constitution and the laws of the United States. *Tumey vs. Ohio*, 273 U. S. 510 at 515. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3).

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[1] "A timely petition for rehearing deferred finality for purposes of review until it was acted upon or until the power to act upon it had expired • • •." *Market Street Railway Co. vs. Railroad Comm.*, 324 U. S. 548, 89 L. Ed. 1171, 65 S. C. R. 770.

QUESTIONS PRESENTED.

Have the Petitioners been deprived of the use of their land by the enforcement of plat restrictions:

(a) where there have been violations of the same restriction by eighty (80) out of eighty-five (85) garages built in the same allotment after both parties purchased their homes;

(b) where the Respondents seeking to enforce this restriction have not objected to any of the other violations although many were in their immediate vicinity;

(c) where the Respondents have not introduced one scintilla of evidence as to any damage caused to them by the alleged breach and no Court made a finding of any damage whatsoever;

(d) where the enforcement would work a substantial hardship on the Petitioners.

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provisions involved are contained in Article XIV, Section 1 of the Amendments to the Constitution of the United States, which is as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT.

Alvey L. Smith and his wife, Phyllis V. Smith, hereinafter referred to as *Petitioners*, and George R. Myers, and his wife, Catherine L. Myers, hereinafter referred to as *Respondents*, are neighbors and among the first purchasers of homes in a new allotment of One Hundred Sixty-Nine (169) homes. The pertinent recorded plat restrictions for the allotment set forth in the appendix (see page 24) set up certain side line restrictions for building. After the purchase of their homes by the Petitioners and Respondents, there were eighty-five (85) garages built in the allotment prior to this cause of action, eighty (80) of which were built in violation, without objection by the Respondents, of the same plat restriction which the Respondents sought to enforce by an injunction action filed against the Petitioners, four (4) days after construction was started and the garage partially complete. The action was tried in the Common Pleas Court and the Common Pleas Court did not allow any claim for damages on the part of the Respondents, because there was no evidence of damage, but found that there was an enforcible plat restriction against the Petitioners and ordered them to tear down the existing stucture. The findings of the Common Pleas Court were appealed to the Ninth District Court of Appeals for the State of Ohio where the action was tried *de novo*. In the evidence presented to the Court of Appeals, the original allotment owner, who had placed the restrictions of record, submitted a sworn affidavit that he had considered the restrictions completely abandoned by the actions of the owners who had built the eighty (80) garages previously mentioned. The Court of Appeals decided against the Petitioners on the issue of the injunction action. However, again the Court of Appeals awarded no damages whatsoever for the action of the Petitioners and

did not indicate any place in their decision that there were any damages in any manner. An appeal as of right and a Motion to have the Court of Appeals certify its records was filed in the Ohio Supreme Court and both were denied. A Motion for rehearing of order to certify records was also denied, all on the basis of "no debatable constitutional issues."

REASONS FOR GRANTING THE WRIT.

The words of the Supreme Court of Ohio in *Akron vs. Chapman*, 160 O. S. 382 at page 388, set forth the reasons more clearly than the writer is able to do:

> "The substantial value of property lies in its use. If the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right."
>
> "The right to continue to use one's property in a lawful manner and in a manner which does not constitute a nuisance * * * is within the protection of Section 1, Article XIV, Amendments to the Constitution of the United States and Section 16, Article I of the Ohio Constitution which provides that no person shall be deprived of life, liberty or property without due process of law."

Here the Petitoners have clearly been deprived of their property without due process of law by the interpretation of the Courts below by attempting to enforce a restriction which has clearly been abandoned by the property owners.

Another reason for the granting of the Writ is that the Petitioners have been deprived of the equal protection of the law. Eighty (80) other people in the same allotment have been permitted to violate the same restriction herein sought to be enforced prior to the injunction action by the Respondents. This is enforcement, by law, of discrimination in violation of Amendment XIV, Section 1 of the

Constitution of the United States which provides that states shall not deny to any person within its jurisdiction the equal protection of the laws.

The failure of the Respondents to object to the actions of the Petitioners until four days after the construction had started on the garage in question, even though the Petitioners took months securing approval for his building permit from the local government authorities which notified the Respondents of the intentions of the Petitioners, and the conduct of the Respondents in failing to object to the other eighty (80) violations of the plat restriction, even though many of the violations were in fact within plain sight of the Respondents' property, raises the question of justice and equity to the Petitioners, who will suffer a great hardship and when no damage will be suffered by the Respondents, particularly in view of the overwhelming authority that holds that restrictive covenants on land should be construed most favorably toward the free use of land.[2]

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[2] "Where certain restrictions are a part of a general scheme or plan for the benefit and improvement of all the lands included in a certain tract, courts of equity will, under proper circumstances, enforce such restrictions at the suit of any grantee against any other such grantee." But, by exception, " 'Equity will not as a rule enforce a restriction where * * * the property, and that in the vicinage, has so changed in its character and environment and in the uses to which it may be put as to make it unfit or unprofitable for use if the restriction be enforced, or where to grant the relief would be a great hardship on the owner and of no benefit to the complainant, or where the complainant has waived or abandoned the restriction, or, in short, it may be said that where, from all of the evidence it appears that it would be against equity to enforce the restriction by injunction, relief will be denied, and the party seeking its enforcement will be left to whatever remedy he may have at law.' " *"Castleman v. Avignone*, 56 App. D. C. 253, 256, 258, 12 F. 2d 326, 329, 331." *James vs. Brown*, 109 F. 2d 830 at page 831. "Restrictions upon title which restrain alienation and use are not favored by law." *School Dist. 2 vs. U. S.*, 220 F. 2d 681. *U. S. vs. Finn*, 127 F. Supp. 158.

The authorities are very clear in not only the State of Ohio, but in most all states, that damage is an element necessary to be found prior to the issuance of any injunction action,[3] and in this case there was not one scintilla of evidence of damage presented by the Respondents and no Court in the State of Ohio, either on hearing or rehearing has been able to substantiate or even find in their reports that there has been any element of damage suffered by the Respondents in any manner whatsoever.

The Court of Appeals, in their findings, found that the evidence did disclose that many owners of the property in the allotment had violated the restriction in the construction of their garages, but the degree of violation was not as great as that of the Petitioners in this particular case. Except in the case of minute or trivial violations, which is not the instant case, the degree of violation is not the test. It is whether the restriction has been violated or not. The violations found by the Court of Appeals were violations of (2) feet, whereas the violation of the Petitioners was four (4) feet. Ohio case law on

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[3] "An injunction cannot be granted unless damage or substantial injury is shown or where injury is merely anticipatory." *Alaska Sales & Service vs. Rutledge*, 128 F. Supp. 1 (Headnote 7). "Even where question of right to be enforced by injunction is not doubtful it is the duty of court to balance convenience of parties." "Generally injunctions, whether final or interlocutory, will not issue unless irreparable injury will flow from act or threatened act and damages will not compensate for such injury." *Paramount Pictures Corp. vs. Holden*, 166 F. Supp. 684. "Equity jurisdiction to grant injunctive relief should be exercised only in cases reasonably free from doubt on showing that intervention is essential to protect property rights against otherwise irremediable injuries." *Petroleum Exploration vs. Public Service Comm.*, 21 F. Supp. 254. "Showing of irreparable injury is necessary to warrant action by court of equity." *Hubbard Inv. Co. vs. Brast*, 59 F. (2d) 709; *Campbell vs. Medalie*, 71 F. (2d) 671. "To obtain injunction complainant must show that defendant is threatening to do wrong which will cause complainant irreparable injury." *Haldeman-Julius Pub. Co. vs. Kiely*, 63 F. (2d) 814; *Bernstein vs. Herren*, 136 F. Supp. 493 (Headnote 11).

this point is relatively clear. See *Boehme vs. Bertram*, 18 O. C. C. (N. S.) 43 at page 45, where the Court says, "Because, having assented to the violation of the restriction which we hold to be that dwellings shall be erected for one family only to the extent of assenting to their being used for a residence of more than one family in each dwelling house, it is not now in the mouth of the plaintiff to say what number of families may be provided for in a dwelling house on one of these lots." The Petitioners sincerely believe that they have been deprived of the use of their land by the action of the Courts in upholding a plat restriction which has been clearly abandoned and the enforcement of the restriction has been without any showing whatsoever of damages on the part of the Respondents. The Petitioners feel that there has been gross discrimination and that the case law in Ohio has not been followed, all of which has deprived the Petitioners of rights granted to them by the United States Constitution.

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WARREN W. GIBSON,

Of Counsel for Petitioners.

APPENDIX A.

Finding of the Court of Common Pleas of Summit County, Ohio.

(June 8, 1959.)

HARVEY, J.:

Plaintiffs and defendants are adjoining property owners of Lots 1 and 2 in the Searlhurst Allotment, which was duly recorded in 1949, and consisted of a Subdivision of one hundred sixty-nine homes developed in accordance with a general plan by Heslop, Incorporated, which Corporation constructed apparently every house in the allotment.

The parties both acquired title to their property in 1949.

Plaintiff is asking that the Defendant be enjoined from constructing a kitchen and garage which when completed would be within one foot of the Myers' property, and the Plaintiff Myers claims that this is in violation of a five foot side line restriction.

It seems to be undisputed that there is such a restriction and that this restriction is a covenant running with the land for the benefit not only of the grantors but for all the grantees and for all owners of lots in the allotment.

It is, also, undisputed that the common grantor had laid out this allotment with a general scheme or plan, and that all the deeds referred to this plat or plan as recorded.

Now, in effect, the defendant is admitting that he has violated the restriction in and of itself, but claims that such restriction has been universally violated by owners of lots in the allotment, and that they are no longer of any force or validity.

An examination of the evidence in this case shows that this allotment is of recent origin, that the general

purpose of the allotment, which is a residential area, is still in existence; that there have been few, if any, violations of restrictions made, as shown by the evidence, in an allotment of this size.

The evidence also shows, according to the exhibits and chronological events, in the partial construction which was made by the defendant that he was aware of the restrictions and that he wilfully went forward. In fact, the evidence seems to disclose that he tried to do as much work as possible before there was any injunction against him.

He was notified by letter on October 17th. He had discussed this matter sometime previous to any construction with the Plaintiff Myers, and they attempted to negotiate the sale of a two foot strip.

It is quite apparent that both parties at the outset thought that the three foot side line restriction, as provided by the Cuyahoga Falls Building Code was the only restriction that it was necessary to obey, but it also seems apparent that the defendant in this case learned otherwise before he began the construction.

The Defendant in this case seems to have been particular misled by the fact that he received a Building Permit and that the zoning authorities passed upon his right to build this garage. He apparently never consulted an attorney nor examined his deeds or the plat, and, of course, the City of Cuyahoga Falls were not concerned about the restrictions in the deed.

The plaintiff in this case cannot be guilty of laches. It is apparent that he acted very quickly in this matter. Hence the defendant, who already admits that he violated the restrictions is left with the defense of Waiver and Estoppel or Laches.

Whatever violations have been made by other property owners in this allotment are not such as to say that the general scheme or plan has been abandoned, or that the area has changed, nor can that constitute an estoppel as against the plaintiff exercising his right under the restrictions.

The Supreme Court of Massachusetts in the case of *Goulding vs. Phinney,* 125 N. E. 703, holds that the plaintiff's right to relief from a violation of restriction which directly affects her lot was not forfeited by a mere failure to object to similar violations by some others in the neighborhood. And the same holding is made by the same Court in *Bacon vs. Sahdberg,* 179 Massachusetts 396, 60 N. E. 936; and *Evans vs. Foss,* 194 Massachusetts 513, and 80 N. E. 587.

It is, therefore, the opinion of the Court that the plaintiff is entitled that the Temporary Injunction heretofore granted be made permanent.

The further question arises as to whether or not the plaintiff is entitled to a Mandatory Injunction.

When an allotment is laid out under a scheme or plan not only for the benefit of the grantor but for the benefit of the grantees or for the benefit of each owner, there is under such circumstances a contractual relationship that a particular thing shall not be done. All that a Court of Equity has to do is to say by way of injunction that that which the parties have already said by way of covenant that the thing shall not be done, and in such case injunction does nothing more than give the sanction of the processes of Court to that which already is the contract between the parties.

It is not then a question of convenience or inconvenience, or the amount of damage of or injury. It is the

specific performance by the Court of that negative bargain which the parties have made with their eyes open between themselves.

The injury here may not be great, but it is not so slight as to be within the maxim of "de minimus," and therefore we think that the plaintiff is entitled to a Mandatory Injunction requiring the Defendant to tear down any wall that is within the restricted area.

A Journal Entry may be prepared in accordance with this, granting the Defendant at least sixty days in which to tear down any wall that is within the five foot restricted area.

APPENDIX B.

Journal Entry of the Court of Common Pleas of Summit County, Ohio.

This cause came on for hearing and was tried to the Court without a jury and with both parties present and in Court with counsel.

Upon the evidence offered by the parties and after the consideration of the briefs prepared and filed herein by the respective counsel, the Court has filed herein its findings in writing and Now THEREFORE, in accordance therewith, it is hereby ordered, adjudged and decreed as follows:

1. That judgment be, and the same hereby is, rendered in favor of the plaintiff upon his petition for a permanent injunction and it is therefore ordered that the defendants, Alvey L. Smith and Phyllis V. Smith, be and they hereby are, enjoined and restrained, jointly or severally, or in concert with others, or having others at their instance, or by contract or otherwise, from committing any of the following acts upon the plaintiffs' premises, or within five (5) feet of the defendants' easterly sideline, which is also the westerly sideline of the plaintiffs, to-wit:

(a) Any and all acts of trespass upon the premises of the plaintiffs.

(b) Erecting and constructing, or causing to be constructed or erected, within five (5) feet of the parties' common sideline, all or any part of a building, structure or wall, designed for permanent building purposes, regardless of the nature of the material and whether or not it is attached to the dwelling house.

2. That the plaintiffs be, and they hereby are, granted a mandatory injunction against said defendants and that said defendants are hereby required and ordered to tear down and remove all or any part of the structure, building

or wall now situated within five (5) feet of the parties' common sideline and all of which shall be torn down and removed on or before September 1, 1959.

3. That the defendants pay the costs of these proceedings as taxed by the Clerk in the sum of Dollars.

FRANK H. HARVEY,

Judge of the Court of Common Pleas.

APPENDIX C.

Opinion of the Court of Appeals of Summit County, Ohio.

(Decided Feb. 10, 1960.)

SYLLABUS.

1. A valid restriction upon the use of property, incorporated in the deeds by which the owners hold title, and which restriction does not endanger the safety, health or general welfare of the community, is not superseded or nullified by the adoption of a zoning ordinance less restrictive than the covenant so recorded as a part of the allotment plan.

2. To be effective as a bar to injunctive relief against a breach of a promise respecting the use of land, the breach of a corresponding promise must be a breach approximating in gravity the breach against which relief is sought.

APPEAL ON QUESTIONS OF LAW AND FACT

WILLIAM R. FERGUSON,
For Appellees.

WARREN W. GIBSON,
For Appellants.

HUNSICKER, *J.*

This is an appeal on questions of law and fact from a judgment entered in the Common Pleas Court of Summit County, Ohio. The action seeks to enjoin the claimed violation of a covenant running with the land, and, by a mandatory order, to require the removal of a certain construction built in claimed violation of the restriction. No question is raised as to the validity of the covenants as prepared, recorded, and made a part of the restrictions in the allotment, known as the Searlhurst Allotment, Cuyahoga Falls, Ohio.

George R. Myers and his wife are the owners of a lot adjoining the house and lot owned by Alvey L. Smith and his wife. Both properties are located in the Searlhurst Allotment. Smith wishes to construct a garage which is to be attached to another addition to his home. In order to build this garage, he would be one foot from the line of the Myers lot.

Section 3 of the restrictions in Searlhurst Allotment, as recorded in Book 43, pages 1, 2, 3, and 4, Summit County Records, says:

> "No building shall be located nearer to the lot line or nearer to the side street line than the building setback lines shown on the recorded plat. In any event, no building shall be located on any residential building plot nearer than twenty-five (25) feet to the front lot line, nor nearer than twenty (20) feet to any side street lines. No building except a detached garage or other outbuilding located one hundred (100) feet or more from the front line, shall be located nearer than five (5) feet to any side lot line."

The addition to the house which Smith has constructed is not in violation of the restriction; however, the garage to be attached to this addition, a part of one wall of which is now built, is within one foot of the Myers property. This garage, if built, would face the street and would be set back so as to present, along with a breezeway, a house with a straight line facing the street, from the garage of the Smith house to the opposite end of the house.

There is no testimony that any other house in the allotment has such an attached garage, as is contemplated herein, although there is some testimony that there are other attached garages in the allotment. No other home in the allotment has a garage within one foot of the side line of the adjoining lot, although there is testimony that 80 of the 85 garages built in the allotment are less than 5

feet from the side line of the adjoining lot, and two are slightly less than 3 feet from such lot line. Nearly all garages are built on the rear of the lots, many of which lots are 50 feet wide and only 100 feet deep. The Myers lot, being No. 2, is larger than many of the lots, and is on the corner of Stuart Avenue and Tallmadge Road. The Smith lot, being No. 1, also is larger in area than many of the lots, and is the next lot west of the Myers lot.

The claim of the appellants, Smith, is that: they are building a garage which will be less than five feet from their east side lot line, under a building permit issued by Cuyahoga Falls; the restrictions have been so universally violated by owners of lots in the Searlhurst Allotment that such restrictions are no longer of any force or validity; the Myerses have waived all rights to enforce the restrictions, and are estopped to enforce the restrictions. The Smiths also say that the Myerses have been guilty of laches in the premises.

There has been no laches here on the part of Myers, for, after being informed by Smith that a garage was to be built, in violation of a supposed three-foot zoning regulation, Myers objected, even though Smith offered to buy two feet of the Myers land. At no time did Myers consent to the building of the proposed garage within one foot of the side line of his lot.

The fact that Smith received permission from the city zoning authorities for a variance of the three-foot setback from a lot side line is not controlling in the face of a valid building restriction contained in an allotment plan.

The zoning authority has no power to change or vary covenants running with the land if the covenants are otherwise valid.

"The owner of one of two adjoining lots which were conveyed from a common grantor by deeds con-

taining a covenant restricting their use 'for the purpose of a private residence only,' the validity of which is not disputed, may enforce the restriction and enjoin the use of the other lot for commercial parking purposes where there has been no such radical change in the character of the allotment and neighborhood as can be held destructive of such covenant, even though a municipal zoning ordinance, passed subsequent to the acquisition of title by the present owners of the lots, permits the use of such lots for commercial purposes."

Szilvasy v. Szviers, et al., 70 O. App. 34.

We next consider the claim that the restrictions have been so universally violated by owners of lots in the Searlhurst Allotment that such restrictions are no longer of any force or validity.

The evidence does disclose that many owners of property in this allotment have violated the restriction in the construction of their garages, in that the respective garages are less than 5 feet from the front lines of the lots. In no instance, however, has anyone built a structure one foot from the line, and there is no evidence of a garage attached to the house along the front line of any house in the allotment. All garages shown by pictures and by oral testimony have been set back from the house, although some garages, because of the curve of the street, appear to be in line with a neighbor's house. There is a general uniformity of location of most garages which shows most of them to be detached and built toward the rear of each home.

The general rule, in cases such as the instant action, is stated in *McGuire v. Caskey*, 62 O. S. 419, as follows:

"1. Where neighboring proprietors of urban lots are bound by a covenant in a deed, under which both hold, not to erect buildings within a prescribed dis-

tance from the street upon which the lots abut, either is entitled to an injunction to enforce observance of the covenant by the other."

A lot owner is not estopped to enforce the restrictions because of other violations of the restrictions by other lot owners, where there is substantial value in the restriction to the one seeking to enforce the covenant. *Brown v. Huber, et al.*, 80 O. S. 183; *Romig, et al., v. Modest, et al.*, 102 O. App. 225; See also: 15 *O. Jur.* 2d, Covenants, Sec. 138, and authorities there cited.

A case very similar to the instant case is *Goulding v. Phinney*, 125 N. E. 703. The violation in that case consisted of placing a building within less than five feet of the side line of the lot, contrary to the restriction contained in the original deeds given by the one who laid out the lots. This restriction as to building within five feet of the lot line had been generally disregarded in the vicinity of the lots. The court there said that the right to relief from a violation of the restriction which directly affected the lot was not forfeited by a mere failure to object to similar violations by some others in the neighborhood.

A collation of authorities on the subject of "Building side line restrictive covenants" may be found in 36 *A. L. R.* 2d 861, *et seq.*

The rule generally followed in cases similar to the instant case is stated in 5 *Restatement of the Law of Property* (Servitudes), Chapter 47, Topic C—Equitable Defenses, Sec. 560 f, at page 3305, as follows:

"f. Substantially like violations. To be effective as a bar to injunctive relief against a breach of a promise respecting the use of land the breach of a corresponding promise must be a breach approximating in gravity the breach against which relief is sought. If less in gravity it may have the effect of barring injunctive relief against an equal or a lesser breach without bar-

ring relief against so much of a breach as is or would be a greater breach. Thus building five feet beyond a set-back line may prevent the securing of an injunction against building out an equal distance, but not prevent the securing of an injunction against building ten feet beyond the line."

The test set out in the third paragraph of the syllabus of *Romig, et al., v. Modest, et al.*, 102 O. App. 225, which says:

> "3. In such case, the test is whether, under the circumstances, there is still a substantial value in such restriction, which is to be protected; and where there is a substantial value to the dominant estate remaining to be protected, equity will enforce a restrictive covenant against the erection of fences."

applies in this case as effectually as though the side wall of the garage were a fence.

We therefore determine herein that: the covenant, restricting the erection of buildings within five feet of the side line of the Myers lot, is valid; it has not been waived, abandoned or lost, by reason of laches on the part of Myers; and an injunction should issue as prayed for in the petition.

Injunction granted.

The parties will prepare a journal entry as was journalized in the Court of Common Pleas.

DOYLE, P. J., and STEVENS, J., concur.

APPENDIX D.

Journal Entry of the Court of Appeals of Summit County, Ohio.

This cause came on for hearing, *de novo*, and was submitted to the Court on the original pleadings filed in the trial Court, the complete Bill of Exceptions, the Deposition of Robert Hough and additional exhibits and drawings of the defendant together with briefs and argument by counsel.

Upon the evidence offered by the parties and after the consideration of the briefs prepared and filed herein by the respective counsel, the Court has filed herein its findings in writing and Now THEREFORE, in accordance therewith, it is hereby ordered, adjudged and decreed as follows:

(1) That judgment be, and the same hereby is, rendered in favor of the plaintiffs-appellees upon their petition for a permanent injunction and it is therefore ordered that the defendants-appellants, Alvey L. Smith and Phyllis V. Smith, be and they hereby are, enjoined and restrained, jointly or severally, or in concert with others, or having others at their instance, or by contract or otherwise, from committing any of the following acts upon the plaintiffs premises or within five (5) feet of the defendants easterly sideline, which is also the westerly sideline of the plaintiffs, to wit:

(a) Any and all acts of trespass upon the premises of the plaintiffs.

(b) Erecting and constructing, or causing to be constructed or erected, within five (5) feet of the parties common sideline, all or any part of a building, structure or wall, designed for permanent building purposes, regardless of the nature of the material and whether or not it is attached to the dwelling house.

(2) That the plaintiffs be, and they hereby are, granted a mandatory injunction against said defendants and that said defendants are hereby required and ordered to tear down and remove all or any part of the structure, building or wall now situated within five (5) feet of the parties' common sideline and all of which shall be torn down and removed on or before April 15th, 1960.

(3) That the defendants pay the costs of these proceedings as taxed by the Clerk in the sum of $ Dollars.

ARTHUR W. DOYLE,
Presiding Judge
For the Court.

APPENDIX E.

Journal Entry of the Court of Appeals of Summit County, Ohio, Overruling Motion for New Trial.

This cause was submitted to the Court upon the motion of the appellants for a new trial herein:

Upon consideration whereof, the Court overrules the same, at the costs of appellants.

Exceptions granted to appellants.

It is now ordered that this cause be remanded to the Court of Common Pleas of Summit County for execution and all further orders herein.

Approved:

ARTHUR W. DOYLE,
Presiding Judge—For the Court.

APPENDIX F.

Order of the Supreme Court of the State of Ohio Dismissing Appeal as of Right.

(October 5, 1960.)

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Summit County, upon the motion of the appellees to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellees recover from the appellants their costs herein expended, taxed at $ _____.

ORDERED, That a special mandate be sent the Court of Appeals of Summit County, to carry this judgment _____ into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Summit County, "for entry."

APPENDIX G.

Order of the Supreme Court of Ohio Overruling Motion to Certify Record.

(October 5, 1960.)

Motion for an Order Directing the Court of Appeals of Summit County to Certify its Record.

It is ordered by the Court that this motion be, and the same hereby is, overruled.

APPENDIX H.

Denial of Rehearing by The Supreme Court of Ohio.

November 2, 1960.

Mr. Warren W. Gibson
Attorney at Law
2695 North Haven Boulevard
Cuyahoga Falls, Ohio

Re: George R. Myers et al., appellees, v. Alvey L. Smith et al., appellants. Case No. 36585.

Dear Mr. Gibson:

We are directed by the Supreme Court to advise counsel in this case that the Court has considered the application for rehearing, filed therein, and that a rehearing is denied.

Sincerely yours,

JOHN MCCONNELL.

c/c Mr. William Ferguson
Second National Building, Akron, Ohio.

APPENDIX I.

Covenants and Restrictions.

(3) No building shall be located nearer to the lot line or nearer to the side street line than the building set back lines shown on the recorded plat. In any event, no building shall be located on any residential building plot nearer than twenty-five (25) feet to the front lot line, or nearer than twenty (20) feet to any side street lines. No building, except a detached garage or other outbuilding located one hundred (100) feet or more from the front lot line shall be located nearer than five (5) feet to any side lot line.